IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO. CA&R 141/2021

DONOVAN GEORGE COOK **Appellant**

and

THE STATE **Respondent**

JUDGMENT

LAING J:

[1] This is an appeal against sentence.

[2] The appellant was charged with rape, in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, read with, *inter alia*, sub-section 51(1) and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ('CLAA'), as amended. The offence involved the rape of a young girl, under the age of 16 years.

Statement in terms of section 112

[3] At the commencement of trial, the appellant pleaded guilty to the charge and submitted a written statement to the court *a quo* in terms of section 112 of Act 51 of 1977. He admitted that he had committed an act of sexual penetration with the complainant. This had happened on more than one occasion. He had raised the complainant as his step-daughter and she had lived with him and her biological

mother. The appellant admitted further that he had attended many parties at the weekend during the course of 2019 and had consumed substantial amounts of alcohol. Upon his return home, he would enter the complainant's room and insert his penis into her vagina without her consent. This subsequently resulted in the complainant's falling pregnant, which led to an abortion. The appellant had known at the time that his actions were wrongful and unlawful.

[4] On 2 July 2021, the Gqeberha Regional Court found the appellant guilty and sentenced him to life imprisonment.

Evidence for purposes of sentence

[5] The court *a quo* accepted the submissions made by the appellant's legal representative with regard to his personal circumstances. To that effect, the appellant was 52 years old at the time of sentence and a first offender. His drinking habits had led to the commission of the offence. The appellant was remorseful about what had happened[1] and pleaded guilty at the commencement of proceedings, without wasting the court's time and without exposing the complainant to the risk of experiencing secondary trauma as a result of having to testify.

[6] He had no formal education. He is the father of four children, three of whom stay separately with their mother, while the youngest is the son of his current partner (the complainant's mother) and stays with her. He is not a primary care-giver.

[7] Moreover, the appellant had health problems in relation to his back, and difficulties with regard to sight and hearing. No further details were given.

[8] The State asserted that the complainant had been 13 years old when she was first raped. This happened in her own bedroom and had been committed by someone whom she had considered as her father. She had had to endure the trauma of a pregnancy and an abortion.

[1] The record, at 6-7, indicates that the appellant felt 'very bad' about what he had done to his child, as conveyed by his legal representative.

[9] The fact that the appellant had pleaded guilty did not assist. It was suggested by the State that the appellant would not have done so unless his DNA profile had been matched with that of the complainant and the aborted foetus.

Issues to be decided, and approach

[10] The primary issue for consideration by this court is whether the imposition of a life sentence on the appellant by the court *a quo* was correct. In that regard, it is a well-established principle that a court of appeal will not interfere lightly with the trial court's exercise of its discretion.[2] In E du Toit et al *Commentary on the Criminal Procedure Act* (Jutastat, RS 66, 2021), at ch30-p42A, the learned authors observe that:

> "A court of appeal will not, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court…"[3]

[11] The circumspect approach to be adopted by the court of appeal has been emphasised frequently. In *S v Bogaards* 2013 (1) SACR 1 (CC), Khampepe J held, at [41], that:

> "It can only do so [i.e. interfere with the sentence imposed] where there has been an irregularity that results in the failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it."

[12] Similarly, Maya DP held in *S v Hewitt* 2017 (1) SACR 309 (SCA), at [8], that:

> "It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the

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[2] See *S v Romer* 2011 (2) SACR 153 (SCA); *S v Hewitt* 2017 (1) SACR 309 (SCA); and *S v Livanje* 2020 (2) SACR 451 (SCA).

[3] The learned authors also referred to *S v Malgas* 2001 (1) SACR 469 (SCA); *S v Fielies* [2014] ZASCA 191 (unreported, SCA case no 851 / 2013, 28 November 2014); *S v Mathekga and another* 2020 (2) SACR 559 (SCA); and *S v Gebengwana and another* (unreported, ECG case no CA&R 186 / 2015, 21 September 2016.

> trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a "striking" or "startling" or "disturbing" disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised."

[13] It is the duty of this court to interfere with the sentence only where the trial court's exercise of its discretion was clearly wrong. Failing this, the sentence must be left undisturbed.

Discussion and findings on sentence

[14] The appellant cited *S v Malgas* 2001 (1) SACR 469 (SCA) in relation to the test for whether substantial and compelling circumstances exist to justify a departure from the prescribed minimum sentence. This entailed a determination of whether the sentence was proportionate to the crime, the criminal, and the interests of society. Furthermore, argued the appellant, not affording proper weight to a factor relevant to the imposition of sentence, such as the accused's personal circumstances, could constitute a misdirection.[4] It was asserted that the magistrate had failed to consider properly the personal circumstances of the appellant and the circumstances of the case, and had over-emphasized the seriousness of the offence and the interests of society. If regard had been given to the appellant's personal circumstances, his plea of guilty, his having been a first offender, and his having demonstrated remorse, then this would have warranted a departure from the prescribed minimum sentence.

[15] The State referred to *DPP, Grahamstown v Peli* 2018 (2) SACR 1 (SCA) as authority for the proposition that for intoxication to be considered as a substantial and compelling circumstance in mitigation, it had to be shown that the consumption of alcohol had impaired or affected the appellant's mental faculties or judgment, thereby

[4] To that effect, the appellant cited *S v Fazzie* 1964 (4) SA 673 (A) and *S v Zinn* 1969 (3) All SA 57 (A).

diminishing his or her moral blameworthiness.[5] This aspect, however, was not pursued by the appellant and nothing further needs to be said in that regard.

[16] Turning to the record, it is patently clear that the magistrate took into account the appellant's personal circumstances, including his age, the fact that he was a first offender, that he was the father of four children, and that he experienced various health problems.[6] Furthermore, the magistrate considered the submissions made by the appellant's legal representative with regard to his plea of guilty and the avoidance of secondary trauma for the complainant.[7] She also considered the submissions made to the effect that the appellant had demonstrated remorse.[8] In weighing these up, together with other mitigating factors, the magistrate found that:

> "the aggravating factors in this case… are overwhelming. I am therefore of the view that the imposition of the prescribed minimum sentence will be just and proportionate to the crimes in question and having a balance [sic] the personal circumstances of the accused, the crime committed and the interests of society, those taken together with the purposes of punishment [sic], I am of the view that the… sentence [of life imprisonment] will be appropriate in the circumstances."[9]

[17] The magistrate cannot be criticised for not having taken the personal circumstances of the appellant into account. These were balanced against the nature of the offence and the interests of society, whereupon the magistrate held correctly, with respect, that the fact that the appellant had raped the complainant while she was a 13-year-old girl, in the sanctity of her bedroom, and as a father figure, was a severe breach of trust. Moreover, he had betrayed the trust of the complainant's mother. The rapes had taken place without a condom, causing the complainant to fall pregnant. The resulting abortion must have further traumatised the complainant. As the magistrate rightly observed, the complainant's life has been affected permanently.[10]

[18] The rape of a young girl, repeatedly, in these circumstances and with these consequences, must inevitably attract the strongest censure that the law permits.

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[5] See, too, *S v Cele* 1990 (1) SACR 251 (A), at 254h-I and 255b-c; *S v Makie* 1991 (2) SACR 139 (A), at 143c-d; and *S v Eadie* 2002 (1) SACR 663 (SCA), at 673j-674f.
[6] At 16 of the record.
[7] Op cit, 17-18.
[8] Op cit, 22-24.
[9] Op cit, 25.
[10] Op cit, 22.

[19] The framework for the interpretation and application of the minimum sentence provisions of the CLAA remains that described in *S v Malgas* 2001 (1) SACR 469 (SCA). In *S v Mahlangu and others* 2012 (2) SACR 373 (GSJ), Satchwell J observed, at 377g-h, with reference to *Malgas*:

> "Firstly the legislature, in enacting the Act,[11] aimed at ensuring a 'severe, standardized and consistent response from the courts'. Secondly, the emphasis in sentencing has shifted 'to the objective gravity of the type of crime'. Thirdly, substantial and compelling circumstances means 'truly convincing reasons'. There must not be marginal differences in personal circumstances or degrees of involvement. At the end of the day, 'the ultimate cumulative impact of the circumstances must be such as to justify a departure'."

[20] It is not axiomatic that the appellant's plea of guilty, in this matter, reveals a sense of remorse. He may well regret his actions, but it could also be argued, as the State has done, that he was left with no choice with regard to his trial strategy once the results of the DNA test had become known. On its own, the plea does not convincingly demonstrate remorse. Furthermore, the appellant's age is inconsequential; he is neither particularly young, allowing the possibility of rehabilitation, nor particularly old, preventing him from managing the rigors of imprisonment. Very little, if anything, was advanced in relation to the nature and severity of his health problems. There is no apparent reason why these cannot be addressed by the usual healthcare services made available to offenders. Furthermore, the appellant's children are under the care and supervision of their respective mothers, leaving aside for the moment the question of the extent to which the appellant should be allowed access, if any, to the complainant. He is not a primary caregiver. And the fact that he is a first offender is of little assistance. Cumulatively, the personal factors mentioned in relation to the appellant do not constitute truly convincing reasons for why a departure from the minimum prescribed sentence would have been justified. They do not amount to substantial and compelling circumstances when the gravity of the crime and the interests of society are properly taken into consideration.

[21] The rape of a child is an abhorrent offence. The periodic rape of a child in the sanctity of her own bedroom, in her own home, by her own father (albeit her step-

[11] The reference is to the CLAA.

stepfather), is possibly one of the most serious of offences that exists. The complainant will carry the experience with her for the rest of her life, knowing, too, that she had had to abort a foetus, the tragic outcome of a deeply troubling relationship. The community is repulsed by such a crime and will expect the law to respond decisively.

Relief and order

[22] Consequently, having had regard for the record and the arguments advanced on behalf of the appellant and respondent, respectively, this court cannot find any basis upon which to interfere with the sentence imposed by the court *a quo*.

[23] I order, accordingly, that the appeal against sentence be dismissed.

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JGA LAING

JUDGE OF THE HIGH COURT

I concur.

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SM MFENYANA

ACTING JUDGE OF THE HIGH COURT

APPEARANCE

Counsel for the appellant	:	Mr. Charles, instructed by the Legal Aid Board, Grahamstown.
Counsel for the respondent	:	Adv Zantsi, instructed by the Director of Public Prosecution, Grahamstown.
Date of hearing	:	09 February 2022
Date of delivery of judgment	:	22 February 2022